CHAPTER 7

THE PRELIMINARY MEETING

PURPOSE

The preliminary meeting is the first meeting the arbitrator will hold with the parties or their representatives. It will normally be held after the arbitrator’s appointment is complete but before the parties start to exchange statements setting out the case against each other.

Its purpose is for the arbitrator to satisfy himself that he is properly appointed and to consider submissions from the parties as to the procedures required to be completed before he can make his award and the timetable for those procedures. The intention is for the arbitrator to issue an order for directions immediately following the preliminary meeting that will assist in the efficient and timely completion of the various tasks that need to be undertaken before the award can be made.

As a preliminary meeting is essentially procedural, it is usually only necessary for one representative of each party to attend. If solicitors or other lay representatives are instructed, then usually one solicitor or lay representative will attend with one person from the party that instructs him. The preliminary meeting is not a time for airing the disagreements between the parties other than to explain the subject matter of the dispute and it is certainly not an opportunity for evidence to be given or speeches to be made. Only in the most complex of cases, or where there is a large amount in dispute, will it be appropriate for counsel (a barrister) to attend on behalf of his client. Only rarely will it be necessary for expert witnesses to attend.

Although the arbitrator can try to persuade the parties not to bring large numbers of people to the preliminary meeting, he cannot prevent their attendance providing they are engaged by or employed
by one of the parties. No representatives of third parties should be at the preliminary meeting. The only exception to this is when the arbitrator might request the approval of the parties to allow a pupil arbitrator to sit with him, to take no part, but for educational purposes only.

In some cases, for example arbitrations on documents only and many consumer arbitrations, it may be possible to dispense with the preliminary meeting altogether. However in any case where there might be a hearing, a preliminary meeting is usually invaluable.

**FORMAT OF THE PRELIMINARY MEETING**

**Introductions**

Both parties will have been sent an agenda by the arbitrator some days before the preliminary meeting. Preliminary meetings are normally held at the arbitrator’s offices but can be held anywhere that is convenient. The arbitrator will chair the meeting and after introducing himself will ask the claimant’s representative to introduce himself and anyone else he has brought with him; the respondent’s representative will then do likewise. At this point the arbitrator might be aware that someone is at the preliminary meeting who is neither employed by nor acts for one of the parties but is there as an interested third party. In such a case the arbitrator should ask that person to leave the room.

**Working through the agenda**

The arbitrator will then work through the agenda item by item, asking both parties to address him on each issue. It is common at a preliminary meeting for there to be a large measure of agreement between the parties over procedural matters; it appears that neither party wishes to offend the arbitrator or appear unreasonable at this stage. Indeed sometimes the parties’ representatives will have made contact after receipt of the agenda but before the preliminary meeting takes place and will have reached broad agreement on the timetable for the arbitration reference. It will be remembered that one of the general principles of arbitration as contained in Section 1 (b) of the Arbitration Act 1996 is that the parties should have autonomy to agree what they can. The arbitrator will be bound by such agreements.

If there is disagreement on any matter under consideration at the preliminary meeting, then the arbitrator must decide after hearing both sides. It is best for decisions of this nature to be given orally at the time rather than reserved for a later decision in writing, although of course all decisions and indeed all relevant agreements will be recorded in writing as an arbitrator’s order for directions following the preliminary meeting.

**Identifying the written arbitration agreement**

One of the first items on a typical agenda for a preliminary meeting will be the demonstration by the parties that there is a written arbitration agreement. This is important because Sections 1 to 84 of the Arbitration Act 1996 only apply to written arbitration agreements. The definition of written arbitration agreements is dealt with in Chapter 3 above.

If there is any doubt whether a written arbitration agreement exists, the arbitrator will often invite the parties to enter into a simple written agreement to submit their disputes to his arbitration during or immediately following the preliminary meeting.

**Any challenges to jurisdiction?**

The next point of importance on the agenda is for the arbitrator to establish whether there are or are likely to be any challenges to his jurisdiction. If there are any matters of jurisdiction raised, almost always by the respondent, the arbitrator will not rule on them at the preliminary meeting. He must first establish that the parties have not removed his competence to rule on his own jurisdiction under Section 30 of the Act.

If the arbitrator has power under Section 30, he will set a timetable for the exchange of written submissions on jurisdiction and then discover whether the parties are content for him to make an award on jurisdiction on the basis of written submissions alone or whether they require an oral hearing. Generally if one party requires an oral hearing, the arbitrator should agree. If there is to be a hearing on jurisdiction the arbitrator will usually set the date for that hearing.
48 The preliminary meeting

at the preliminary meeting. Exceptionally the parties may agree or the arbitrator may decide to rule on jurisdiction as part of his award on the merits; this form of procedure is very unlikely to be adopted if a challenge to jurisdiction is raised at the preliminary meeting as it will be best for the jurisdiction issue to be resolved as soon as possible in order to save potentially wasted costs.

Any extension to or curtailment of default powers?

Another point of major importance is whether the parties have agreed to extend or curtail the powers given to the arbitrator by the Arbitration Act 1996. Agreements of this nature are rare once the dispute has arisen but it is very common for the parties to agree in their arbitration agreement that any arbitration will be subject to arbitration rules. Many standard form contracts incorporate arbitration rules which will usually extend and only rarely curtail the arbitrator’s default powers under the Act.

Most of the other matters discussed at the preliminary meeting are of a procedural or timetabling nature.

ILLUSTRATIVE AGENDAS FOR PRELIMINARY MEETINGS

There is no standard preliminary meeting agenda, it will vary from case to case and from arbitrator to arbitrator. The only well-known attempt at producing such a standard agenda has been made by the United Nations in its “UNCITRAL Notes on Organizing Arbitral Proceedings”, a copy of which is set out in Appendix 5. In an international context there is a great deal of merit in standardisation which breeds familiarity and confidence in the procedure, even if carried out in a country foreign to one or both parties.

A typical agenda for a preliminary meeting in England where both parties are British and the reference is to a sole arbitrator might be:

The preliminary meeting

a. If written representations, what documents are to be provided and at what stage?

15. Whether and to what extent there should be oral or written evidence of fact:
   a. If written evidence, date for simultaneous exchange of statements of witnesses of fact
   b. Are rebuttal statements to be allowed?: if so date for exchange
   c. Witness statements to be treated as evidence in chief subject to right to ask limited further questions if the matters covered could not reasonably have been included in the witness statements

16. Expert witnesses:
   a. Tribunal appointed or party appointed
   b. If tribunal appointed, dates for joint instructions to experts
   c. If party appointed, number on each side; each party to advise the other of identity and disciplines
   d. If party appointed, experts of like discipline to meet on a without prejudice basis as often as necessary in order to attempt to narrow the differences between them; latest date for first meeting
   e. Date for delivery of expert reports; if party appointed to be exchanged simultaneously
   f. Joint signed statement of experts of like discipline setting out all matters agreed and not agreed to be served with reports
   g. Are brief supplementary reports in reply to be allowed?: date for simultaneous exchange

17. Pre-hearing review meeting; date, time and location-to be attended by advocate chosen for the hearing

18. Bundles of documents, restricted to those to be referred to at the hearing:
   a. Claimant to prepare draft bundles in chronological order with oldest documents at the top, at this stage unnumbered, and forward to respondent; date
   b. Respondent to interleave additional documents it requires to be added and return to claimant; date
   c. Claimant to number and copy bundles and deliver copies to the arbitrator and respondent; date
   d. Electronic storage and retrieval of documents; if so, protocol

19. The hearing:
   a. Duration, time and place; who is to arrange venue and facilities?
   b. Transcript of the hearing; electronic transcribing-transcript to be available, when?
   c. Restricting the length of the hearing-guillotine procedure, each party to be given half time available

20. Tribunal to appoint legal advisers and/or technical assessors

21. Are the parties to be represented at the hearing, if so, by whom?

22. Date for exchange of written opening statements:
   a. Full copies of all legal authorities to be provided

23. Are witnesses to be examined on oath or affirmation?:
   a. Solicitors/representatives to provide documents necessary for the administration of oaths to witnesses not of the Christian or Jewish faiths

24. Closing submissions-oral or in writing?: if in writing dates for service
25. Have the parties agreed that the award shall be in any particular form?
26. Any agreement between the parties that the arbitrator may order provisional relief-Section 39 of the Arbitration Act 1996
27. Any points of law or issues that may be appropriate for a partial award-Section 47 of the Arbitration Act 1996
28. Confirmation that the substantive law applicable is English law
29. Do the parties choose not to have a reasoned award?
30. Any agreement to exclude powers of the court to determine points of law under Sections 45 and/or 69 of the Arbitration Act 1996
31. Any agreement that the arbitral proceedings shall be consolidated with other arbitral proceedings or that concurrent hearings shall be held; if so, on what terms
32. Security for the arbitrator's fees and expenses
33. Limiting the recoverable costs of whole or part of the arbitration (the legal or other costs of the parties) to a specified amount
34. Figures to be agreed as figures
35. Correspondence, plans and photographs to be agreed as such as far as possible
36. Communications with the arbitrator:
   a. Copies of all communications to the arbitrator to be sent to the other party and marked to that effect
   b. Telephone calls to the arbitrator's secretary only
37. Can arbitrator use his expert knowledge and experience?: any restrictions
38. Site inspection?: if so, when
39. Does the arbitrator have authority to record any agreements reached at the preliminary meeting on behalf of the parties?
40. Any other business

Typically the preliminary meeting may take one to one and a half hours if the full agenda is followed.

**BRIEF COMMENTARY ON AGENDA ITEMS**

1. **Agreement of the arbitrator's Standard Scale of Charges and Terms of Engagement**

   Usually the arbitrator will have agreed his charges and terms of engagement with both parties before accepting appointment. If however he has been appointed by a third party, such as the president of a professional institution, then it may not have been possible to have reached such agreement. In such cases, before the pre-
52 The preliminary meeting

liminary meeting, the arbitrator will have sent a copy of his charges and terms of engagement to both parties and invited their agreement. Often parties will indicate their agreement at the preliminary meeting.

It may be thought inappropriate for the first item on the agenda to be the arbitrator’s fees; it can of course be placed later. The reason it is sometimes placed first is that the arbitrator may not be prepared to carry on if his terms cannot be agreed, and by dealing with this issue first, costs can be saved if there is a problem with agreement.

2. To identify written arbitration agreement

This has been covered earlier in this chapter.

3. To identify the nature of the matters in dispute in general terms

The purpose of this item on the agenda is for the arbitrator to ensure, in cases where a technical arbitrator is required, that the nature of the dispute is within his professional knowledge and experience.

4. Whether arbitration to be governed by any institutional arbitration rules

This had been covered earlier in this chapter. The usual purpose of rules is to maximise the powers given to arbitrators and to set timetables for procedural steps in the arbitration in order to ensure rapid, efficient and cost-effective disposal of the dispute. Some rules provide for institutional administration of the arbitration, in which all of the early steps of the arbitration are carried out through the arbitral institution; the institution may also vet the award before it is delivered to the parties.

5. Whether parties have entered into any other agreements affecting the arbitrator’s powers under the non-mandatory Sections of the Arbitration Act 1996

Many Sections of the Arbitration Act are non-mandatory; that is the parties are free to agree the relevant powers to be given to the arbitral tribunal, and it is only in the absence of such agreement that the default powers set out in the Act will apply. It would be tedious to set out every default non-mandatory power in the agenda for a preliminary meeting; it is best to let the parties tell the arbitrator if they have reached any agreements other than incorporation of any arbitration rules. There are over twenty Sections and Sub-Sections in the Act that set out default powers of the arbitral tribunal unless the parties agree otherwise.

6. Seat of the arbitration—are it agreed to be England?

Under Section 52 of the Arbitration Act 1996, the arbitrator, unless the parties agree otherwise, must state in his award the identity of the seat of the arbitration. The “seat of the arbitration” is defined in Section 3 of the Act as the juridical seat of the arbitration designated by the parties, designated by any arbitral institution with powers to do so, or designated by the arbitral tribunal if so authorised by the parties.

The concept is relevant primarily to international arbitrations. With very minor exceptions Sections 1 to 84 of the Arbitration Act only apply where the seat of the arbitration is in England, Wales or Northern Ireland. In cases where both parties and the subject matter of the arbitration are based within England, Wales or Northern Ireland, the Act clearly applies and the seat can be a town or country within those geographical limits, usually but not necessarily where the arbitration is held.

In international arbitrations the parties may agree that the seat of the arbitration is London even if neither party is British and the subject matter of the dispute has nothing to do with Britain. Such agreement will bring the arbitration under the Arbitration Act 1996.

7. Language of the arbitration—is it confirmed to be English?

Under Section 34 (2) (b) of the Arbitration Act 1996 it shall be for the arbitral tribunal to decide the language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied, always subject to the right of the parties to agree the language to be adopted.
54 The preliminary meeting

8. Do any questions of jurisdiction arise?

a. If so, is the tribunal to rule on the matter in an award as to jurisdiction or as part of an award on the merits?

b. Timetable for exchange of submissions on jurisdiction.

c. Date for hearing on jurisdiction (if any).

d. If an application is to be made to the court for a ruling on jurisdiction, should the proceedings continue meantime?

This has been covered earlier in this chapter.

9. Whether any and if so what form of written statements of claim and defence are to be used, when they should be supplied and the extent to which such statements can later be amended?

a. Formal pleadings

Formal pleadings are Points of Claim, Points of Defence and Counterclaim (if any) and Points of Reply. They are the type of written statements required in court proceedings. They must state all of the facts relied on in support of the party's case and the remedies sought with as much particularity as will alert the other side to the case they have to meet. Pleadings do not state or summarise the evidence that will be called in support of the allegations, nor do they state points of law which will be relied on or argued. Pleadings are normally drafted by barristers and it has been cynically suggested that they often disguise rather than clarify the issues between the parties.

Pleadings do not identify documents nor are copies of principal documents annexed to them. Disclosure of documents is left for a process called discovery after pleadings have closed.

Lawyers are more familiar with pleadings than other forms of reducing the nature of the dispute to writing and often lawyers representing parties may agree to pleadings in arbitration because it is familiar territory.

b. Full narrative statements of case annexing witness statements and principal relevant documents, listing all documents relied on, setting out arguments on points of law arising and a summary of evidence to be adduced

Statements of case setting out the nature of the dispute in narrative form, rather like telling a story, are much more common in arbitration. Unlike pleadings they set out the summary of evidence to be called in support of each allegation and witness statements may be annexed. Relevant law is set out and argued; principal documents are annexed to the statements of case and each party will list all of the documents on which it intends to rely. The statements must be sufficiently full to enable the other party to fully understand the case it has to meet.

After receipt of the statement of case the respondent will serve a statement of defence together with a statement of counterclaim, if there is to be a counterclaim. This will be followed by the claimant's statement of defence to the counterclaim. As discussed below, each party may usually be permitted to serve a reply to the respective statements of defence.

c. Are requests for further and better particulars to be permitted?; if so, time for delivery and reply

In the case of pleadings, it may not be clear to the party in receipt of a particular pleading the precise case it has to meet. The usual reason is that rather vague allegations have been made. Unless further and better particulars are given it will not be possible for the party in receipt to seek confirmation from its own witnesses as to whether the allegation is true or not.

Frequently requests for further and better particulars are merely time-wasting exercises which can run up great expense. If statements of case are used including documents and a summary of evidence is included, the case being made out will usually be much clearer.

In an effort to comply with his duties under Section 33 of the Arbitration Act 1996, the arbitrator may restrict the right of parties to make indiscriminate requests for further and better particulars.
Scott Schedules-if so, protocol for exchange in electronic format

A Scott Schedule is so named after an Official Referee called Scott who devised it. An Official Referee is a special kind of judge who sits in the High Court to hear cases of a very technical nature (usually construction industry cases). A Scott Schedule is simply a type of document layout which is divided into a series of vertical columns as this illustration:

<table>
<thead>
<tr>
<th>Identifier</th>
<th>Description of item</th>
<th>Claimant's contentions</th>
<th>Claimant's quantum</th>
<th>Respondent's contentions</th>
<th>Respondent's quantum</th>
<th>Arbitrator's quantum</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

This form of Schedule, which can be served as part of a pleading or statement of case, is particularly useful if there are a series of items of a similar nature in dispute. For example a house owner may be arbitrating against the builder for defects in construction. Each defect will be listed in turn, the particular clause of the specification that is alleged to have been breached together with the method of correcting it will be set out in the adjacent column, and the build up to and the total of the monetary claim made in respect of that item will be in the next column.

e. Whether reply to defence to be allowed

Each party will have had an opportunity to state its case through the statement of claim and statement of defence. The question then arises as to whether the claimant should be given an opportunity to serve a statement of reply to the defence. If new facts are alleged in the defence then it will normally be just to allow the claimant to reply to these allegations. In the case of counterclalm, all of the relevant facts usually come out in the statement of counterclaim and statement of defence to counterclaim, there is therefore usually no need for a reply to defence to counterclaim.

10. Whether any and if so what documents or classes of documents should be disclosed between and produced by the parties and at what stage—if so, dates for exchange of lists and inspection

The process of forced disclosure of documents is peculiar to the common law system as practised in Great Britain, USA and various former British colonies. In the civil law system there is no such requirement.

The process of forced disclosure of documents is called discovery. Each party has to prepare a list of all documents, which are or may become relevant, which are or have been in its custody, power or possession. The list is normally in three parts: the first part contains those documents in respect of which privilege is not claimed which are in that party’s custody, power or possession; the second part is similar except that it comprises those documents which once were but no longer are in that party's custody, power or possession; the third part contains a list of those classes of documents in respect of which privilege is claimed, for example, legal advice.

The list must contain those documents which are harmful as well as helpful to that party’s case. The other party can then inspect those non-privileged documents which have been listed; this is known as inspection.

Discovery is a very expensive process; civil law countries manage perfectly well without it. It does however have the advantage that each party may well believe that it ensures there are no hidden secrets, no smoking guns!

In civil law countries each party discloses only those documents it wishes to rely on. Research has shown that justice suffers little as a result.

Arbitrators are not bound to order traditional discovery; they can either adopt the civil law system or allow a limited form of discovery where each party has to make out a case to be allowed access to specific documents or classes of documents, and the arbitrator will decide whether that case is justified or not.
11. Whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done

It is sometimes helpful that one or both parties should be permitted to put specific questions to the other which must be answered on oath. It can save large amounts of time in cross-examination if this process is conducted sensibly. The questions for answer are sometimes called “interrogatories”.

12. Do the strict rules of evidence apply?

The rules of evidence mainly concern admissibility of certain types of evidence, for example hearsay. The courts operate to very strict rules of evidence, particularly the criminal courts. In very formal arbitrations it may still be appropriate to adopt court-style rules of evidence, but for most arbitrations those rules will not be appropriate. The arbitrator will give appropriate weight to all the evidence he hears.

13. Whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law

Unless the parties agree otherwise an arbitrator may act inquisitorially; that is instead of remaining relatively passive and considering only the evidence and legal argument presented to him, an arbitrator can take the initiative himself and make his own inquiries to attempt to ascertain the facts and the law.

This may take the form of the arbitrator asking questions of the witnesses at the hearing in an effort to establish the truth, or may go much further and involve detailed inquiries and research. Caution must be exercised as any inquisitorial process runs the danger of apparent or perceived bias. It will however be appropriate for an arbitrator with special technical skills to investigate and decide certain technical issues in conjunction with experts from each side.

Equally an arbitrator may think it appropriate to seek his own legal advice, providing such advice is disclosed to the parties and they have adequate opportunity to deal with it.

14. Is there to be a hearing or is the matter to be decided on the basis of documents only?

a. If written representations, what documents are to be provided and at what stage?

Many arbitrations are resolved without a hearing on the basis of documents alone. If there are no conflicts of fact or technical opinion, a hearing is rarely necessary.

b. Are rebuttal statements to be allowed?; if so date for exchange

c. Witness statements to be treated as evidence in chief subject to right to ask limited further questions if the matters covered could not reasonably have been included in the witness statements

If there is to be a hearing, it needs to be decided whether witnesses of fact will give oral testimony, unsupported by a written proof of evidence, or whether most if not all of the evidence which the party calling that witness wants to adduce can be reduced to writing. The modern practice is for arbitrators to require all witnesses of fact to produce signed witness statements which are exchanged. When the witness gives evidence, he will merely identify himself and state that his statement represents the evidence he wishes to give. He can then immediately be made available for cross-examination. The judicious use of written witness statements, sometimes called proofs of evidence, can save enormous amounts of time and money at the hearing.

15. Whether and to what extent there should be oral or written evidence of fact

a. If written evidence, date for simultaneous exchange of statements of witnesses of fact

b. Are rebuttal statements to be allowed?; if so date for exchange

c. Witness statements to be treated as evidence in chief subject to right to ask limited further questions if the matters covered could not reasonably have been included in the witness statements

If there is to be a hearing, it needs to be decided whether witnesses of fact will give oral testimony, unsupported by a written proof of evidence, or whether most if not all of the evidence which the party calling that witness wants to adduce can be reduced to writing. The modern practice is for arbitrators to require all witnesses of fact to produce signed witness statements which are exchanged. When the witness gives evidence, he will merely identify himself and state that his statement represents the evidence he wishes to give. He can then immediately be made available for cross-examination. The judicious use of written witness statements, sometimes called proofs of evidence, can save enormous amounts of time and money at the hearing.

16. Expert witnesses

a. Tribunal appointed or party appointed

Traditionally in common law jurisdictions each party has appointed its own expert witnesses. It is therefore not uncommon for there to be substantial disagreement between experts; this is not helpful. Arbitrators are not bound by traditional procedure and can adopt
the system used in civil law jurisdictions, such as the continent of Europe, where the tribunal appoints one expert of each relevant discipline to inquire and report to it. Many parties still wish to retain the right to select their own experts. In this book the terms “expert” and “expert witness” are used interchangeably; sometimes a distinction is drawn by referring to tribunal-appointed experts as “experts” and to party-appointed experts as “expert witnesses”.

b. If tribunal appointed, dates for joint instructions to experts

The arbitrator will rarely be sufficiently knowledgeable about the issues and background to the case to be able to prepare his own comprehensive instructions to an expert. It is therefore sensible to ask the parties to prepare joint instructions, or if that proves impossible, to ask the claimant to prepare draft instructions which are then sent to the respondent to be supplemented.

c. If party appointed, number on each side; each party to advise the other of identity and disciplines

Experts should be limited to one for each discipline. The arbitrator has the right and power to limit the number of experts.

d. If party appointed, experts of like discipline to meet on a without prejudice basis as often as necessary in order to attempt to narrow the differences between them; latest date for first meeting

It is standard modern practice for arbitrators and courts to order experts of like discipline to meet under the cloak of privilege to see if they can narrow the differences between them. If the expert witnesses really are experts in their field they ought to be able to agree most of their opinions. Partisan experts, who are merely there as advocates for their client’s case, are of no help in arbitration.

There is a debate as to whether experts should meet before or after they have prepared their reports, at least in draft. The author is a strong advocate of without prejudice meetings of experts commencing as early as possible and certainly before reports are prepared. Once views are expressed in writing, it involves a certain amount of loss of face to change them, together with the risk of some loss of credibility.

e. Date for delivery of expert reports; if party appointed to be exchanged simultaneously

Expert reports will be exchanged sufficiently early to enable each side to absorb the contents of the report in good time prior to the hearing.

f. Joint signed statement of experts of like discipline setting out all matters agreed and not agreed to be served with reports

Many arbitrators will only allow experts to give evidence if they have first prepared and signed a joint report of experts of like discipline setting out all facts and opinions that they are able to agree and those they cannot agree. This assists in identifying the agenda for trial at the hearing.

g. Are brief supplementary reports in reply to be allowed?; date for simultaneous exchange

Sometimes it will be appropriate to give the experts opportunity to respond in writing to any opinions expressed in the reports of experts for the other parties. If this opportunity is given, the time period for it will be short, usually not more than 14 days after exchange of the original reports.

17. Pre-hearing review meeting: date, time and location—to be attended by advocate chosen for the hearing

In all medium and large cases, particularly those that will take several months to prepare, it is sensible for the arbitrator to hold a pre-hearing review. Any outstanding procedural issues between the parties will be aired and detailed arrangements can be made regarding the hearing and the run up to it. At this stage the outstanding issues between the parties will have been crystallised. For these reasons it is always best for the advocate who will represent each party at the hearing to be present at the pre-hearing review.
18. Bundles of documents, restricted to those to be referred to at the hearing

a. Claimant to prepare draft bundles in chronological order with oldest documents at the top, at this stage unnumbered, and forward to respondent; date

b. Respondent to interleave additional documents it requires to be added and return to claimant; date

c. Claimant to number and copy bundles and deliver copies to the arbitrator and respondent; date

d. Electronic storage and retrieval of documents; if so, protocol

Document handling and presentation at the hearing is crucial if the hearing is to run smoothly. Many firms of solicitors are so used to preparing document bundles for court that this head of agenda is superfluous. However so many arbitration hearings get off to a bad start because the bundles are not in order that arbitrators often wish to emphasise its importance by raising it as an item at the preliminary meeting.

19. The hearing

a. Duration, time and place; who is to arrange venue and facilities?

The hearing will be arranged where it is most convenient for most of the witnesses. Convenience of counsel should not be considered as paramount. In the absence of agreement, the claimant usually is responsible for arranging the venue.

b. Transcript of the hearing; electronic transcribing—transcript to be available when?

Arbitrators normally take notes of the evidence and submissions in longhand in a notebook. Unless the arbitrator is proficient in shorthand, the fact that the arbitrator is making notes will slow down the procedure. Court proceedings have historically been transcribed by stenographers or shorthand writers; they are also used in arbitration hearings. Typed or word-processed transcripts will be available about three days later unless the stenographers work in teams.

Modern technology has now permitted stenographer’s ticker tape to be instantaneously translated into word-processed text which can be scrolled up computer monitors on the desk of the arbitrator and advocates.

Stenography, shorthand writing and electronic transcribing are expensive but in larger cases can so speed up proceedings, perhaps by 30 per cent or more, that the saving in hearing time more than compensates for the extra cost of the service.

c. Restricting the length of the hearing—guillotine procedure, each party to be given half time available

Unless some discipline is imposed, hearings can drift on for days longer than predicted because of over-long cross-examination or unnecessary examination-in-chief. If the arbitrator and advocates have only a certain number of days set aside, time may run out before the case is over; this means an adjournment, sometimes for weeks or even months until the advocates and arbitrator have diaries clear enough to arrange a further period of time for the reconvened hearing.

This problem can be avoided by ensuring that the hearing completes within the time allotted for it. Each party will be consulted as to their estimate for the length of the hearing. The hearing duration will be set and the number of working hours at the hearing will be calculated; that figure will then be divided into two and each party will be allocated half of the time so calculated to use as it wishes for examination-in-chief and re-examination of its own witnesses and cross-examination of the witnesses of the other side. Time in opening and closing submissions will also be booked against the party making them.

Time spent will be recorded each day and agreed with the parties. It will be up to each party to efficiently manage the presentation of its case so that it completes before the time expires. When time is exhausted, that party will not be permitted to adduce any more evidence or submissions or conduct any more cross-examination. That is why it is sometimes called a chess clock or guillotine procedure.

It has the main advantage that arbitrator and advocates can organise their diaries in confidence that the case will be over not
The preliminary meeting

later than the end of the period set aside and the parties can predict the likely costs with some degree of accuracy.

20. Tribunal to appoint legal advisers and/or technical assessors

If the arbitrator is not legally qualified and a particularly difficult or important point of law arises, it may be sensible for the arbitrator to appoint a legal adviser to sit through the legal submissions with him and to assist him in reaching a decision and drafting an award. Likewise, if the arbitrator does not possess appropriate technical qualifications and experience and a particularly difficult technical point arises it may be sensible for him to appoint a technical assessor in the same way.

21. Are the parties to be represented at the hearing, if so, by whom?

The parties are free to be represented by whom they wish; they do not have to engage lawyers. If either party intends to instruct counsel it is normal for the other party to be informed so that it can decide whether or not to seek similar representation.

22. Date for exchange of written opening statements

a. Full copies of all legal authorities to be provided

Historically the claimant’s advocate would open his client’s case orally at the beginning of the hearing. The opening would usually take several hours and might take days; this procedure was wasteful of time and money. It is therefore now normal practice for the claimant’s advocate (and the respondent’s advocate if he wishes—particularly if there is a counterclaim) to prepare a written opening which is exchanged about a week prior to the hearing. The arbitrator can read the opening and any legal authorities which are relied on before the hearing starts. The opening may be in full or skeleton form.

The importance of providing full legal authorities is that sections of judgments read out of context can be misleading and the full authority will enable the arbitrator to understand the background to the decision.

23. Are witnesses to be examined on oath or affirmation?

a. Solicitors/representatives to provide documents necessary for the administration of oaths to witnesses not of the Christian or Jewish faiths

It is usual for witnesses to be examined on oath (or affirmation at the witnesses’ choice). If the parties agree that they do not wish evidence to be given on oath, but subject only to a simple promise to tell the truth, that is quite acceptable. Arbitrators will carry copies of the Old and New Testaments and cards on which are printed the words of the standard oath and affirmation. If other documents or articles are required in order to administer oaths to witnesses of religious faiths other than Christianity or Judaism, then each party must be responsible for obtaining the necessary documents and articles and for bringing them to the hearing with a copy of the appropriate words.

An arbitrator who carries out international arbitration will also carry oath and affirmation cards for administering oaths to or taking affirmations from interpreters.

An arbitrator is empowered by Section 38 (5) of the Arbitration Act 1996 to administer oaths and take affirmations.

24. Closing submissions-oral or in writing?: if in writing dates for service

At the end of the evidence each party’s advocate is entitled to make a closing submission. In the past, these submissions were made orally, a continuation of the court practice where the advocate needed to impress the jury. Oral closing submissions are now rare except in the smallest of cases and each party’s advocate will sequentially prepare written closing submissions within a short period after the close of the hearing.

25. Have the parties agreed that the award shall be in any particular form?

If there is any agreement, the arbitrator should be told at an early stage.
The preliminary meeting

26. Any agreement between the parties that the arbitrator may order provisional relief—Section 39 of the Arbitration Act 1996

Although an arbitrator has power to make more than one award, each award must be on different issues and be final in and of itself; this is covered by Section 47 of the Act. The Act does not give an arbitrator any default powers to order, for example, a payment on account, with the final decision left for a later award. However the parties may agree to clothe the arbitrator with just such powers under Section 39 of the Act. If the parties do so agree, one party may apply for provisional relief. In that case the arbitrator should order exchange of written submissions on that point alone and may call a short hearing to receive further oral submissions, before making his decision by order rather than award.

27. Any points of law or issues that may be appropriate for a partial award—Section 47 of the Arbitration Act 1996

It may be of assistance to the parties for the arbitrator to hear a preliminary point of law or a preliminary issue followed by a partial award limited to the preliminary matters put before him. Such a course of action can lead to early settlement of the dispute between the parties and therefore save the time and costs of a full hearing.

28. Confirmation that the substantive law applicable is English law

The contract may state which national substantive law is to apply. If it does not, the parties may agree or failing such agreement they may decide that the substantive law can be determined by the arbitral tribunal. In a case in England between English parties it would be very surprising if the substantive law was not English law, that is the law applicable to England and Wales.

29. Do the parties choose not to have a reasoned award?

Under Section 52 (4) of the Arbitration Act 1996 the award is required to contain the reasons for the award unless it is an agreed award (that is following a settlement) or the parties have agreed to dispense with reasons. Reasons are particularly important if there is to be an appeal from the award on a point of law.

30. Any agreement to exclude powers of the court to determine points of law under Sections 45 and/or 69 of the Arbitration Act 1996

Parties can agree to exclude the court’s power to determine a preliminary point of law and/or to exclude their right to appeal an award on a point of law. If the parties agree to dispense with reasons for the award, they automatically exclude their right to appeal the award on a point of law.

31. Any agreement that the arbitral proceedings shall be consolidated with other arbitral proceedings or that concurrent hearings shall be held; if so, on what terms

The courts are able to cope effectively with multi-party proceedings, and to consolidate different actions between the same parties. It is possible to have a court action with many parties or to join in third parties. Because of the central importance of party autonomy, arbitration does not cope as well with multi-party cases. An arbitrator has no default power to join in third parties or to consolidate actions.

However under Section 35 of the Arbitration Act 1996, the parties are free to agree on consolidation with any other arbitral proceedings, provided all parties in both or all proceedings agree. It may also be agreed that concurrent hearings should be held.

This is sometimes appropriate in a case where there is a dispute between two parties which raises identical issues on identical facts to a dispute between one of those parties and a third party, such as a sub-contractor.

32. Security for the arbitrator’s fees and expenses

The arbitrator will want to ensure that money is available to pay his fees and expenses at the conclusion of the arbitration; it is regrettably not unknown for both parties to become insolvent or to lose interest in the arbitration altogether. For this reason an arbitrator will normally wish to ask for his fees to be secured in some way,
68 The preliminary meeting

often by the payment of a cash sum to be held in a suitable deposit account to the arbitrator's order.

An arbitrator may obtain agreement of both parties to his scale of charges and terms of engagement which may provide for both parties to provide security for his fees and expenses. If so, he is entitled to ask each party to put up 50 per cent of the security. If, however, there is no such agreement the arbitrator will rely on his default powers under Section 38 (3) of the Arbitration Act 1996 (which of course can be removed or amended by agreement between the parties).

Under that Section the arbitrator can only require the claimant or counterclaimant to provide security for his fees and expenses, which are, of course, part of the costs of the arbitration under the definition contained in Section 59 (1) of the Act.

33. Limiting the recoverable costs of whole or part of the arbitration (the legal or other costs of the parties) to a specified amount

It is one of the stated objects of arbitration under Section 1 of the Arbitration Act 1996 that there should not be unnecessary delay or expense. The arbitrator is under a duty under Section 33 of the Act to adopt procedures which will avoid unnecessary delay and expense.

Regrettably it has become a regular feature of complex litigation and arbitration that the costs can be enormous; they can match or occasionally exceed the amount ultimately awarded. In such cases the parties end up fighting more about the costs than the issues themselves. It is standard practice for the loser to be ordered to pay the winner's reasonable costs.

An arbitrator cannot prevent a party spending as much in preparing its case as it wishes, but in the absence of contrary agreement between the parties, the arbitrator can set a cap or limit on the amount of costs that the winning party will be able to recover from the other. Such a cap on recoverable costs is a considerable disincentive to parties to spend costs they know they will not be able to recover even if they win.

If recoverable costs are to be capped, they must be capped early before the costs or a considerable proportion of them, have been spent. The costs cap limit is also subject to review. Before capping recoverable costs the arbitrator will consider representations from each party as to their current estimates of costs of pursuing and defending the claim and pursuing and defending the counterclaim. The arbitrator will normally make separate orders in respect of claim and counterclaim.

34. Figures to be agreed as figures

It is usually non-controversial that the parties should be required to agree figures as figures as far as possible to avoid wasted time at the hearing. For example one party may say—“I do not agree the principle, but if the principle is held to be correct, I agree the figures as claimed”.

35. Correspondence, plans and photographs to be agreed as such as far as possible

Likewise it is helpful to agree that items of correspondence were exchanged between the parties and that plans and photographs are true representations of what they show.

36. Communications with the arbitrator

a. Copies of all communications to the arbitrator to be sent to the other party and marked to that effect

b. Telephone calls to the arbitrator's secretary only

This is routine administration to ensure that the arbitrator does not have any communication with either party without the other knowing about it immediately or being present.

37. Can arbitrator use his expert knowledge and experience?; any restrictions

One of the great advantages of arbitration is that the arbitral tribunal is often expert in relevant technical matters. Nevertheless, subject to the right for the tribunal to take the initiative in ascertaining the facts and the law, the award must be made on the basis of the evidence adduced, not the expert knowledge and experience of the tribunal. To do otherwise would be likely to breach the mandatory requirement for the arbitrator to act fairly and impartially (Section 33 (1) (a) of the Arbitration Act 1996).
The preliminary meeting

For this reason the arbitrator will normally seek the parties' express agreement that he may use his own technical knowledge and experience, often subject to the obligation to put his views to the relevant witnesses if he intends to be influenced by them.

38. Site inspection?: if so, when

To be able to understand the evidence better, it may be sensible for the arbitrator to visit the location of the subject matter of the dispute, usually just before or just after the hearing.

39. Does the arbitrator have authority to record any agreements reached at the preliminary meeting on behalf of the parties?

If the parties have reached agreement at the preliminary meeting on matters which, had they considered the matter, may have formed part of their arbitration agreement, the parties may agree that the arbitrator's order for directions confirming those agreements amounts to part of the written arbitration agreement as defined by Section 5 of the Arbitration Act 1996.

40. Any other business

ILLUSTRATIVE ORDER FOR DIRECTIONS FOLLOWING A PRELIMINARY MEETING

In the matter of the Arbitration Act 1996 and in the matter of an arbitration between

Party A

Claimant

and

Party B

Respondent

Arbitrator's order for directions No. 1

Having carefully considered the oral submissions of Ms A solicitor for the claimant and Mr B representative for the respondent at a preliminary meeting held at my offices at 10:00am on Friday 19 December 1997,

I ORDER AND DIRECT

1. Both parties indicated that my Standard Scale of Charges and Terms of Engagement are agreed.
2. The arbitration will not be governed by any institutional arbitration rules.
3. Other than recorded in this order for directions the parties indicated that they have not entered into any other agreements affecting my powers under the non-mandatory Sections of the Arbitration Act 1996.
4. The seat of the arbitration is to be England.
5. The language of the arbitration is to be English.
6. The respondent indicated that my jurisdiction to arbitrate on the matters of dispute identified by the claimant is challenged on the grounds that some or all of those matters have not been submitted to arbitration in accordance with the arbitration agreement. I will rule on the matter in an award on jurisdiction after considering written submissions only. The parties are to serve written submissions as to their case on jurisdiction to the following timetable:
   a. Respondent's submissions to be served not later than 9 January 1998;
   b. Claimant's submissions to be served not later than 14 days from service of the respondent's submissions;
   c. Respondent's reply to be served not later than 7 days from service of the claimant's submissions.
7. The parties are to set out their cases in writing by serving fully particularised narrative statements of case annexing witness statements and principal relevant documents, listing all documents relied on, setting out arguments on points of law arising and a summary of the evidence to be adduced; to the following timetable:
   a. Claimant's statement of case not later than 30 January 1998
   b. Respondent's statement of defence and statement of counterclaim not later than 28 days from service of the claimant's statement of case
   c. Claimant's statement of reply and defence to counterclaim not later than 28 days from service of the statements of defence and counterclaim
   d. The parties have leave to serve a Scott Schedule. It shall be exchanged in electronic format on floppy disk in Microsoft Excel spreadsheet format.
8. If either party considers that there are documents or classes of documents in the possession, custody or power of the other party and which have not been disclosed or listed in the statements of case and which are important to its case or defence, it shall make application to me for an order for disclosure setting out the grounds for the application.
10. Each party shall simultaneously exchange proofs of evidence of all witnesses of fact not later than 30 April 1998. Proofs of evidence shall stand as evidence-in-chief subject to the right to ask limited further questions if the matters covered could not reasonably have been included in the proofs of evidence.
11. There will be one expert witness appointed by me to carry out inquiries and to serve a report in connection with... The claimant shall serve on the respondent its detailed instructions to the expert not later than 15 May 1998. The respondent shall serve on the claimant its supplemental instructions to the expert not later than 31 May 1998 and serve two copies of the combined instructions on me by the same date.
12. Not later than 15 May 1998 both parties shall inform me whom they have agreed as expert, or in the absence of agreement, each party shall by the same date advise me of the names of three persons whom they consider would be suitable for appointment as expert.

13. A copy of the expert report will be delivered to both parties not later than 31 July 1998. There will be a pre-hearing review meeting at my offices on 26 August 1998 at 10:00 am to be attended by the advocates chosen by each party for the hearing. A copy of the expert report will be delivered to both parties not later than 8 September 1998. The claimant shall prepare draft bundles of documents to be referred to at the hearing in chronological order with oldest documents at the top, at this stage unnumbered, and forward them to the respondent not later than 1 September 1998. The respondent is to interleave additional documents it requires to be added and return the bundles to the claimant not later than 8 September 1998. The claimant to number and copy the bundles and deliver copies to me and to the respondent not later than 15 September 1998.

14. There will be a hearing in this arbitration to be held at the Kings Hotel, Queensford, for 3 weeks from 5 to 22 October 1998 inclusive sitting Monday to Thursday each week. The claimant is to make the necessary arrangements including retiring rooms for the parties and for me, and is initially to bear the costs which will be part of the costs of the arbitration.

15. The claimant is to arrange for an electronic transcription service with hard copies of each day's proceedings to be available by 6:00 pm each evening. The claimant is initially to bear the costs which will be part of the costs of the arbitration.

16. The hearing will be subject to a time guillotine to ensure that it is completed within the three weeks set aside. Each party will be allocated 28 hours, representing an estimate of 50% of the time available during the 12 days set aside for the hearing, to use as they wish to complete their case. No more time will be allowed, unless there are exceptional reasons for me to so allow. The time to count against each party will include opening and closing submissions during the hearing itself, examination-in-chief (if any) and re-examination of that party's witnesses and cross-examination of the other party's witnesses. Time will be recorded to the nearest minute and the cumulative total time used by each party will be recorded to the nearest minute and the cumulative total time used by each party will be agreed at the end of each day's hearing. Time taken by me in questions of clarification during testimony will count against the party examining at that time. Time taken in questions asked by me at the close of a witness's testimony will not count against either party.

17. Statements of witnesses of fact will not be deemed to be proved merely if not challenged in cross-examination by the other party. Neither party shall be under any absolute duty to put all of the relevant parts of its case to each witness of the other party.

18. Written opening statements shall be exchanged not later than 28 September 1998. If any legal authorities are relied on, full copies of the law report or text book extract shall be provided.

19. Witnesses are to be examined on oath or affirmation. Solicitors' representatives are to provide documents necessary for the administration of oaths to witnesses not of the Christian or Jewish faiths. Closing submissions shall be in writing after the close of the hearing. Dates for submission to be decided at the close of the hearing.

20. It is confirmed that the substantive law applicable to this arbitration is English law.

21. The claimant shall deposit the sum of £10,000.00 (ten thousand pounds) with me not later than 20 January 1998, to be held in a new interest-bearing account in my name at National Barcland Bank as security for my fees and expenses. The account will identify the names of both parties and will be held in accordance with the Royal Institution of Chartered Surveyors Regulations for the holding of Client's money. Interest will accrue to the benefit of the claimant.

22. The allowable costs of each party in respect of the claim (but not the counterclaim) shall be limited to £75,000.00 (seventy-five thousand pounds) excluding Value Added Tax. The recoverable costs of each party in respect of the counterclaim (but not the claim) shall be limited to £20,000.00 (twenty thousand pounds) excluding Value Added Tax.

23. Figures are to be agreed as figures and correspondence, plans and photographs are to be agreed as such as far as possible.

24. It is agreed that I can use my expert knowledge and experience in assisting in the determination of any of the disputes in this arbitration.

25. There will be a site inspection on 2 October 1998. Each party will be entitled to designate one person only to accompany me; I will also invite the expert witness to be present. I shall not take any oral evidence during the site inspection.

26. It is confirmed that I have authority to record agreements reached at the preliminary meeting on behalf of the parties in the terms of this order.

27. Liberty to either party to apply to amend any of these directions.

28. Costs in the arbitration.

29. All directions are by consent except those in paragraphs 6, 7(b), 11, 18 and 26.

Signed

Arbitrator

Distribution:
Claimant's solicitors
Respondent's representatives

19 December 1997